The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON, Plaintiffs, v. SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington, Defendants.	Case No. 3:9-CV-05456-BHS WASHINGTON COALITION FOR OPEN GOVERNMENT'S MEMORANDUM OF POINTS AND AUTHORITIES OBJECTING TO PLAINTIFF'S MOTION FOR ENTRY OF PROTECTIVE ORDER NOTE ON MOTION CALENDAR: September 17, 2010 **ORAL ARGUMENT REQUESTED**

COMES NOW Defendant Washington Coalition for Open Government (hereinafter "WCOG") and respectfully files the following Memorandum of Points and Authorities Objecting to Plaintiffs' Motion for Entry of a Protective Order concerning pre-trial discovery that is ongoing in this matter.

Plaintiffs' Motion fails to satisfy the strict requirements set out by the Ninth Circuit concerning entry of protective orders concerning discovery materials.

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I. NATURE OF PRE-TRIAL DISCOVERY

Plaintiffs, following agreement as to a schedule for pre-trial discovery, have proposed to Defendants a list of twenty potential witnesses concerning Count Two of Plaintiff's Complaint, which asserts that Washington's Public Records Act (hereinafter "PRA") is unconstitutional concerning public release of petitions assembled as part of the Referendum 71 process. As the Court knows, Referendum 71 was not passed by Washington voters when it was presented to them for approval in November of 2009. In addition, the United States Supreme Court ruled in the case of *Doe v. Reed*, 130 S.Ct. 2811 (2010), that the PRA was not unconstitutional on its face in mandating the release of signatures on petitions gathered in the course of a referendum process. Plaintiffs now assert that the names of the twenty prospective witnesses and all materials concerning the same should be kept "from public view" because this would ostensibly protect individuals who come forward from alleged, but unsubstantiated threats, harassment and reprisals.

However, as pointed out in the brief of the State of Washington, hereby joined in by WCOG, submitted in opposition to the Motion for Protective Order, not only have most of the individuals identified on the witness lists publicly disclosed themselves as supporters of Referendum 71, but the early depositions that have been taken fail to establish any specific threats, harassment or intimidation as to the potential witnesses who have been deposed.

II. PLAINTIFFS HAVE NOT SATISFIED THE STANDARD FOR IMPOSITION OF PROTECTIVE ORDER

The Ninth Circuit analysis as to entry of a protective order starts "with a strong presumption in favor of access to court records." *Foltz v. State Farm Mutual Automobile Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). A party seeking a protective order for discovery materials must demonstrate that "good cause" exists for the protection of that evidence. "Good cause" is established where it is specifically demonstrated that disclosure will cause a specific prejudice or harm. Courts have held that the showing

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of "good cause" under Fed. R. Civ. P. 26(c) is a "heavy burden." *Rivera v. NIBCO, Inc.*, 384 F.3d 822, 827 (9th Cir. 2004). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211-12 (9th Cir. 2002). Under the law, evidence, not speculation, is required. *Rivera v. NIBCO, Inc.*, *supra*, at 828.

In the materials submitted herewith, the State of Washington has identified that several of the potential twenty witnesses voluntarily participated in the gathering of signatures concerning Referendum 71 and made their names known as proponents of the Referendum. Thus, the names of these individuals are already in the public domain with regard to their support of the Referendum. As a result, Plaintiffs' Motion attempts to "keep secret" information that has already been voluntarily publicly disclosed by the majority of the proposed witnesses. That these individuals signed Referendum 71 petitions would be expected.

In addition, no evidence of threats, harassment or coercion has been submitted by Plaintiffs as to any of these individuals. One of the potential witnesses has testified in his deposition, for instance, that he was not concerned about publicly testifying at trial and he had not been subjected to any harassment or threats during the Referendum 71 signature gathering process. Two of the other early deponents both indicated in their depositions that they had testified at the public hearing concerning Senate Bill 5688, which was commonly known as the "Everything But Marriage Act" and which Referendum 71 sought to overturn. One of these witnesses testified that there were approximately 500 people in the hearing room when she testified.

Assuming, counterfactually, that the Plaintiffs can establish "good cause" to protect the pre-trial discovery, this Court is required to balance "the public and private interests to decide whether a protective order is necessary." *Phillips*, 307 F.3d at 1211. "It is well established that the fruits of pre-

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trial discovery are, in the absence of a court order to the contrary, presumptively public." *San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999). That is, "if the documents are not among those which have 'traditionally been kept secret for important policy reasons' [grand jury transcripts and pre-indictment warrants], then 'the public policy reasons behind a presumption of access to judicial documents (judicial accountability, education about the judicial process etc.)' apply." *Id*. (internal citations omitted). Here, there is a strong interest in judicial accountability and education: the case has attained a high profile among interested citizens, and the pre-trial discovery materials, and the Court's handling of the same, is of public importance.

In determining whether sufficient countervailing interests exist to overcome the strong presumption of access to court records, courts look to the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). Clearly, no trade secrets are at stake here. In this case, there is an incredibly high interest in understanding the judicial process through discovery, briefing and hearings on the merits of the Plaintiffs' alleged harassments, and the public will be able to evaluate and hold accountable the judicial system from the very outset of this endeavor. In contrast, there is very little danger, and absolutely no evidence, that any pretrial discovery would be used for scandalous or libelous purposes. As stated, the vast majority of the Plaintiffs' proffered witnesses have been publicly identified with the Referendum 71 campaign, and would suffer no harm from being named as witnesses in this litigation. Additionally, each of the witnesses already deposed has stated that he or she feels comfortable being publicly identified as a witness, and even testifying in open court at a hearing if required, and therefore no harm could come from their disclosure as a potential witness. In sum, even if the Plaintiffs could establish "good cause," the balancing factors a court must consider tip in favor of access to judicial

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records.

Underlying the public interest in monitoring the progress of this action is that the statute that is under attack by Plaintiffs – the PRA – was adopted by initiative of the people of the State of Washington in 1972. Plaintiffs seek to have that statute declared unconstitutional as applied to the Referendum 71 petitions. No portion of the PRA has ever been declared unconstitutional. The relief sought by Plaintiffs seeks to undercut a statute that the people of the State of Washington have declared is a foundational principle of open government by the people. In the absence of specific evidence of harm, and not merely speculation, the judicial process pursuant to which this foundational principle is subject to attack should not proceed in secrecy. Given the significant interest of the people of the State of Washington in ensuring that governmental process occurs openly, as espoused in the PRA, it is even more important that the good cause standard requiring a specific prejudice or harm be satisfied before records are sealed and secrecy imposed, particularly where the very statute under attack promotes an open process so that Washington residents can understand how government operates. Plaintiffs' Motion for a Protective Order lacks such specificity.

III. CONCLUSION

WCOG respectfully requests that Plaintiffs' Motion for a Protective Order be denied because it does not satisfy the strict requirements for imposing such an order under Rule 26(c).

DATED this 15th day of September, 2010.

WITHERSPOON, KELLEY, DAVENPORT
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By: /s/ Steven J. Dixson
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CERTIFICATE OF SERVICE

1. I, Steven J. Dixson, am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within action. I am employed by the law firm of Witherspoon, Kelley, Davenport & Toole, 422 W. Riverside Avenue, Suite 1100, Spokane, Washington.

2. On the 15th day of September, 2010, I caused to be served upon the parties via the CM/ECF filing system, the WASHINGTON COALITION FOR OPEN GOVERNMENT'S MEMORANDUM OF POINTS AND AUTHORITIES OBJECTING TO PLAINTIFF'S MOTION FOR ENTRY OF PROTECTIVE ORDER, which system will send notification of such filing to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

/s/ Steven J. Dixson, WSBA #38101
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